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Consolidated with Nos. 02-1386 and 02-1405

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IN THE SUPREME COURT
OF THE UNITED STATES

JEREMIAH W. (JAY) NIXON, ATTORNEY GENERAL
STATE OF MISSOURI,
Petitioner,

v.

MISSOURI MUNICIPAL LEAGUE, ET AL.
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

PETITIONER'S BRIEF

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49 pp

QUESTION PRESENTED

In enacting 47 U.S.C. § 253(a), which bars the states from prohibiting "any entity" from providing intrastate or interstate telecommunications services, did Congress clearly and manifestly deprive the states of the ability to bar their own political subdivisions from entering the telecommunications business?

PARTIES TO THE PROCEEDING

Petitioner is the State of Missouri. The Solicitor General, on behalf of the Federal Communications Commission, and Southwestern Bell Telephone, L.P., also filed petitions for writs of certiorari which the Court granted and consolidated with the State of Missouri's writ.

Respondents here – petitioners at the FCC – are The Missouri Municipal League, the Missouri Association of Municipal Utilities, City Utilities of Springfield (Missouri), City of Columbia (Missouri) Water and Light, and the City of Sikeston (Missouri) Board of Utilities.

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PETITIONER'S BRIEF

OPINIONS BELOW

The opinion of the court of appeals, filed August 14, 2002, reported at 299 F.3d 949 (8th Cir. 2002), appears at pages A-2 through A-13 of the Appendix to the State's petition for writ of certiorari ("Pet. App."). The court of appeals' order denying rehearing, entered November 20, 2002, appears at Pet. App. A-14. The opinion of the Federal Communications Commission, reported at 16 F.C.C.Rcd. 1157 (2001), appears at Pet. App. A-15 through A-32.

JURISDICTION

The court of appeals entered its judgment on August 14, 2002. That court denied rehearing on November 20, 2002. Petitioner State of Missouri filed its petition for writ of certiorari on February 18, 2003. This Court granted that petition, as well as those filed by the Solicitor General and Southwestern Bell Telephone Company in Nos. 02-1386 and 02-1405, on June 23, 2003. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Article I, § 8, cl. 3:
The Congress shall have the power . . . To regulate commerce with foreign nations, and among the several states, and with the Indian tribes . . . .

Constitution of the United States, Article IV, § 4:
The United States shall guarantee to every state in this Union a republican form of government . . . .

Constitution of the United States, Article VI, cl. 2:
This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

Constitution of the United States, Amendment X:
The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

47 U.S.C. § 253(a) (1996):
(a) In General - No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

Mo. Rev. Stat. § 392.410.7 (1997):
No political subdivision of this state shall provide or offer for sale, either to the public or to a telecommunications provider, a telecommunications service or telecommunications facility used to provide a telecommunications service for which a certificate of service authority is required pursuant to this section. Nothing in this subsection shall be construed to restrict a political subdivision from allowing the nondiscriminatory use of its rights-of-way including its poles, conduits, ducts and similar support structures by telecommunications providers or from providing telecommunications services or facilities:
(1) For its own use;
(2) For 911, E-911 or other emergency services;
(3) For medical or educational purposes;
(4) To students by an educational institution; or
(5) Internet-type services.
The provisions of this subsection shall expire on August 28, 2002.[1]

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[1] The statute as originally considered by the FCC would have expired in 2002. But its life was extended; the "sunset" clause now reads, "The provisions of this subsection shall expire on August 28, 2007." Mo. Rev.

INTRODUCTION AND STATEMENT

Section 392.410.7 Mo. Rev. Stat. (1997) addresses the authority of political subdivisions of the State of Missouri with regard to telecommunications services. It became effective on August 28, 1997. It joined a long list of Missouri statutes that define the authority of particular offices, agencies, and subdivisions of the State. It permits a political subdivision to allow nondiscriminatory use of its rights of way and to provide certain kinds of telecommunications services or facilities, such as those for its own use, for emergency services, medical or educational purposes, or Internet-type services. But it denies political subdivisions the authority to provide or offer for sale the kind of telecommunications service for which a certificate of service authority is required, *e.g.*, commercial telephone service.

The Missouri Municipal League, the Missouri Association of Municipal Utilities, City Utilities of Springfield, City of Columbia Water and Light, and the City of Sikeston Board of Utilities (the "Missouri Municipals") filed a joint petition on July 8, 1998, with the Federal Communications Commission (FCC), claiming that § 392.410.7 is preempted by 47 U.S.C. 253(a) (1996). Section 253(a), part of the Telecommunications Act of 1996, bars state or local laws from prohibiting or having the effect of prohibiting "the ability of any entity to provide any interstate or intrastate telecommunications service."

This was the second time that the FCC had been asked to invoke § 253(a) to preempt state laws that reign in state subdivisions that wish to engage in

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Stat. § 392.410.7 (Supp. 2002).

the telecommunications business. Soon after the Missouri Municipals' filing, the FCC issued an order denying the City of Abilene, Texas's request to preempt Texas statutes that were similar to § 392.410.7. *In re: City of Abilene Petition for Preemption*, 13 F.C.C.Rcd. 3460 (1997) The Texas laws, §§ 54.001, 54.201-.202 Tex. Util. Code, prohibit municipalities from obtaining certificates to provide telecommunications services or from selling those services, directly or indirectly, to the public. While the Missouri Municipals' petition was pending before the FCC, the United States Court of Appeals for the District of Columbia Circuit affirmed the FCC's decision not to preempt the Texas statutes. *City of Abilene, Texas v. Federal Communications Comm'n*, 164 F.3d 49 (D.C. Cir. 1999).

The State of Missouri filed comments with the FCC, asserting its right to control the activities of its own political subdivisions. The State urged the FCC to deny the Missouri Municipals' petition. On January 12, 2001, the FCC issued its order, following the D.C. Circuit's holding in *City of Abilene* and declining to hold that the Missouri law was preempted by § 253(a). Pet. App. A-15 - A-33.

The Missouri Municipals appealed the FCC's decision to the U.S. Court of Appeals for the Eighth Circuit. The State of Missouri intervened to defend its statute – and, more generally, its right to define the authority of its own political subdivisions. Departing from the D.C. Circuit's holding in *City of Abilene*, the Eighth Circuit reversed the FCC's decision. Pet. App. A-2 - A-13. The Eighth Circuit ruled that the term, "any entity," is both broad and clear, that municipalities are "entities," and that the States thus cannot in any way prevent municipalities and other political subdivisions from

engaging in the commercial telecommunications business.

The State of Missouri, the FCC, and Southwestern Bell Telephone, L.P. each filed petitions for writs of certiorari. The Court granted and consolidated those petitions.

SUMMARY OF ARGUMENT

This appeal addresses the impact of § 253(a) of the Telecommunications Act of 1996, 47 U.S.C. § 253(a) (1996), on the ability of the States to define the authority of their own political subdivisions. Section 253(a) bars States and local government from "prohibiting . . . any entity" from engaging in telecommunications services. According to the Eighth Circuit, § 253(a) even bars a state from preventing its own political subdivisions from entering the telecommunications business. So read, § 253(a), would exceed congressional authority.

The constitutional separation of powers ensures not just a division among the executive, legislative, and judicial branches, but also a division between the states and the federal government. This diffusion of power operates in various ways to protect American liberty. But it only works if the states retain some areas of sovereignty, areas that Congress cannot penetrate. The ability of States to define the authority of their own political subdivisions is such an area.

The States are not compelled to divide and delegate their power to political subdivisions – though they all do so, to varying degrees. When a State does delegate power to a subdivision, it does not hand the subdivision plenary authority; the

authority is always circumscribed in some fashion. For municipalities, geographic limitations are the most obvious. But States impose functional limitations as well – limitations that focus cities and other subdivisions on the tasks for which they were created, and that limit their ability to jeopardize success by engaging in peripheral ventures. Missouri's choice to circumscribe the authority of its political subdivisions to enter the telecommunications business is such a limitation. It enforces the policy of the State to leave most commercial business in private hands, avoiding the risks of both unfair, government-subsidized competition, and commercial failure that could redound to the detriment of the cities – and, ultimately, to the detriment of the State of which the cities are merely subdivisions.

In § 253(a), Congress limited state authority. Qualified by other provisions of the Telecommunications Act of 1996, States now cannot prohibit private persons or companies from entering the telecommunications business. Congress derives its authority to impose that limit from the Commerce Clause. But even Commerce Clause authority has boundaries. And one of those boundaries, principally derived from the Tenth Amendment, is where the action would infringe on some inviolable area of state sovereignty. The constitutional scheme of dividing powers between the States and the federal government, embodied in the limited authority granted to Congress in Article II and the retained authority of the States confirmed in the Tenth Amendment, simply will not countenance Congress forcing the States to choose between having no subdivisions at all and permitting government to enter businesses that the state's legislature, as the representative voice of the citizenry, deems to be outside the scope of its proper

function.

The power to define the authority of subdivisions it may create, and for which it is ultimately responsible, is of paramount importance in retaining state sovereignty. If Congress could constitutionally usurp that power, it could control many of the essential functions of the States. By doing so, Congress would eliminate the protections – and accountability – that the separation of federal and state powers was designed to ensure. That result cannot be justified by the possibility that a State may, by keeping a potential governmental competitor out of the marketplace, have some impact on interstate commerce. Again, if § 253(a) is read to permit Congress to usurp the States' power to regulate their own political subdivisions, it must exceed congressional power. Thus § 253(a) must be read, if possible, to stop short of that line.

In order to avoid burdening the States with congressional decrees that perhaps inadvertently cross the line, this Court has imposed a particular standard on Congress: whenever Congress extends its regulation to the activities of States (acting as states, as opposed to states voluntarily entering the marketplace), it must do so with "clear and manifest" language. Assuming that § 253(a) could be logically read to bar the States from regulating themselves and their own subdivisions, that reading is not "clear and manifest." Generalized terms like "any entity" simply do not contain the kind of precision this Court has insisted – appropriately, given the need to protect state sovereignty – that Congress provide.

There is an alternative reading of § 253(a) that avoids the collision between the Commerce Clause and the Tenth Amendment: to exclude from "any

entity" those whose statutes and regulations are being barred – *i.e.*, state and local governments.

ARGUMENT

I. If § 253(a) barred States from regulating their own political subdivisions, it would be beyond the scope of congressional authority.

If § 253(a) included state subdivisions among the "entities" that neither States nor local governments can prohibit from entering the commercial telecommunications business, it would usurp the States' authority to define their own administrative and political structures. Such usurpation would fall outside the scope of congressional authority.

A. The ability to define the authority of their subdivisions is a fundamental part of the states' "inviolable sovereignty."

Separation of powers is a key element of our constitutional scheme. Such separation

> protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.

New York v. U.S., 505 U.S. 144, 187 (1992). In *Printz v. U.S.*, the Court reemphasized that the division of "power among sovereigns" – *i.e.*, between the federal government and the sovereign States – is critical to the protection of liberty:

> This separation of the two spheres is one of the Constitution's structural protections of liberty. "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive

> power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."

Printz v. U.S., 521 U.S. 898, 921 (1996), quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). The Court pointed out that the Founders believed that dividing powers among the branches of the federal government and then between the federal government and the States gives a "double security . . . to the rights of the people." The Federalist No. 51, at 323, quoted in *Printz v. U.S.*, 521 U.S. at 922.

For the "separation of the two spheres" to be an effective check against "tyranny and abuse," it must ensure the accountability of the competing levels of government. As Justice Kennedy explained: "The theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States." *United States v. Lopez*, 514 U.S. at 549, 577 (1995) (Kennedy, J. concurring). The citizens "must have some means of knowing which of the two governments to hold accountable for the failure to perform a given function." *Id.* at 577-78. "Federalism serves to assign political responsibility, not to obscure it." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992).

This Court most recently referred to the danger of merging the spheres of federal and state authority in *Federal Maritime Comm'n v. South Carolina State Ports Authority*, 535 U.S. 743, 769 (2002) (*S.C. Ports*):

> By guarding against encroachments by the Federal Government on fundamental aspects of state sovereignty, . . . we strive to maintain the

balance of power embodied in our Constitution and thus to "reduce the risk of tyranny and abuse from either front."

Id. at 769, quoting *Gregory v. Ashcroft*, 501 U.S. at 438. The Court reiterated that "[d]ual sovereignty is a defining feature of our Nation's constitutional blueprint." *S.C. Ports*, 535 U.S. at 751 (2002), quoting *Gregory v. Ashcroft*, 501 U.S. at 457.

"Dual sovereignty" contemplates substance and not just form, *i.e.*, that the sovereign States have powers independent of – and that cannot be overruled by – those of the federal government. Thus this Court observed that the "Constitution instead 'leaves to the several States a residuary and inviolable sovereignty.'" *New York v. U.S.*, 505 U.S. at 188, quoting The Federalist No. 39, p. 245 (C. Rossiter ed. 1961). The Court has given some, though not complete, definition to that "inviolable sovereignty."

The Court has "acknowledge[d] that 'the authority to make . . . fundamental . . . decisions' is perhaps the quintessential attribute of sovereignty. Indeed, having the power to make decisions and to set policy is what gives the State its sovereign nature." *F. E. R. C. v. Mississippi*, 456 U.S. 742, 761 (1982). The Court has never catalogued the "fundamental decisions" that lie beyond congressional control. But it has quoted the Founders, who observed generally that the States' retained powers "extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." The Federalist No. 45, pp. 292-293 (C. Rossiter ed. 1961), quoted in *Gregory v. Ashcroft*, 501 U.S. at 458. And the Court has confirmed that there are "State activities and State-owned property

that partake of uniqueness from the point of view of intergovernmental relations," and declared that some activities "inherently constitute a class by themselves. Only a State can own a Statehouse; only a State can get income by taxing." *State of New York v. U.S.*, 326 U.S. 572, 582 (1946). *See also Coyle v. Oklahoma*, 221 U.S. 559 (1911).

The class of power that is "inherent" in state sovereignty includes the power to create and define the authority of political subdivisions. Subdivisions of States, including cities, counties, municipalities, and other such organizations, have no independent right to act, or even to exist. In fact, this Court has used a contrast with that relationship to explain the relationship between the States and the Federal government: "States are not mere political subdivisions of the United States." *New York v. U.S.*, 505 U.S. at 188.

Indeed, this Court has recognized the plenary authority of the States over their political subdivisions, pointing out that municipalities owe their very existence to the State. For example, in *Hunter v. City of Pittsburg*, 207 U.S. 161, 178 (1907), the Court observed that "[m]unicipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them," and that the "number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state."

A few years later, the Court reiterated that any limitation of the States' ability to regulate their political subdivisions is to be found in state constitutions, not federal law:

> In the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of self-government which is beyond the legislative control of the state. . . . However great or small its sphere of action, it remains the creature of the state exercising and holding powers and privileges subject to the sovereign will.

City of Trenton v. State of New Jersey, 262 U.S. 182, 187 (1923) (footnote omitted), citing *Barnes v. District of Columbia*, 91 U. S. 540, 544 (1875). *See also City of Trenton*, 262 U.S. at 185-86 ("The city is a political subdivision of the state, created as a convenient agency for the exercise of such of the governmental powers of the state as may be intrusted to it.").

The Court later reiterated that "[a]s the denomination 'political subdivision' implies, [these] local governmental units . . . derive their authority and power from their respective States," *National League of Cities v. Usery*, 426 U.S. 833, 856 n. 20 (1976) (*Usery*), and that "fundamentally, a municipality is merely a political subdivision of the State from which its authority derives," *United Bldg. & Constr. Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden*, 465 U.S. 208, 215 (1984).

More recently, the Court found it was "well settled that local government units are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion." *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 607-08 (1991). And just last Term, the Court quoted that conclusion from *Mortier*, then confirmed, "Whether and how to use that discretion is a question central to state self-government." *City*

of Columbus v. Ours Garage and Wrecker Service, 536 U.S. 424, 437 (2002).[2] *See also Holt Civil Club v. Tuscaloosa*, 439 U.S. 60, 71 (1978) ("affirming that States have "extraordinarily wide latitude ... in creating various types of political subdivisions and conferring authority upon them."), quoted in *City of Columbus v. Ours Garage*, 536 U.S. at 437.

The State's grant of power to a subdivision is not permanent; the State may "at its pleasure, . . . modify or withdraw all such powers, ... or vest [them] in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation." *Hunter v. Pittsburg*, 207 U.S. at 178-179. Put another way, the State may "strip [a municipality] of every power, leaving it a corporation in name only; and it may create and recreate these changes as often as it chooses." *Barnes v. District of*

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[2] In *Ours Garage*, the court went on to observe that "[o]rdinarily, a political subdivision may exercise whatever portion of state power the State, under its own constitution and laws, chooses to delegate to the subdivision." *Id.* at 428-429. The question in *Ours Garage* was whether the State could delegate authority, not, as here, whether it could withhold or withdraw such a delegation. The court observed that if Congress had included in 49 U.S.C. § 14501(c), a separate "reference at all to 'political subdivision[s] of a State,'" instead of referring only to "the 'safety regulatory authority of a State,'" the reference to "State" "would have undoubtedly embraced both state and local regulation." *Id.* at 432. That conclusion is a logical result of the manifest interrelationship between states and the subdivisions they create – a relationship in which a subdivision exists at the pleasure of, and wields only the authority granted to them by, the State.

Columbia, 91 U.S. 540 at 544-45. *See also City of Trenton*, 262 U.S. at 187 ("A municipality is merely a department of the state, and the state may withhold, grant or withdraw powers and privileges as it sees fit.").

The preeminent position of the State vis-a-vis its subdivisions is true in Missouri, as elsewhere. When a Missouri state subdivision – a school district – was before this Court, Justice Kennedy observed: "Local government bodies in Missouri, as elsewhere, must derive their power from a sovereign, and that sovereign is the State of Missouri." *Missouri v. Jenkins*, 495 U.S. 33, 64 (1990) (Kennedy concurring). *See Premium Standard Farms, Inc. v. Lincoln Township of Putnam County*, 946 S.W.2d 234, 238 (Mo. banc 1997) ("It is an established principle that local governments have no inherent powers but are confined to those expressly delegated by the sovereign and to those powers necessarily implied in the authority to carry out the delegated powers."); *Century 21-Mabel O. Pettus, Inc. v. City of Jennings*, 700 S.W.2d 809, 811 (Mo. Banc 1985) ("A municipality derives its governmental powers from the state and exercises generally only such governmental functions as are expressly or impliedly granted it by the state.").

That rule is embodied in various parts of the Missouri Constitution, including in its provision regarding charter cities – the state subdivisions with the broadest authority:

> Any city which adopts, or has adopted a charter for its own government, shall have all the powers which the General Assembly of the state of Missouri has authority to confer upon any city, provided such powers are consistent with the constitution of the state and *are not limited or denied* either by the charter so adopted *or by*

statute. Such a city shall, in addition to its home rule powers, have all powers conferred by law.

Art. VI, Section 19(a), Missouri Constitution (emphasis added). Exercising its power to define the authority of state subdivisions, Missouri specifically authorizes, but also regulates, municipal utilities in Mo. Rev. Stat. Chapter 91. Missouri, then is among the states in which the question of local government authority is within the State's "absolute discretion" (*Hunter v. City of Pittsburg*, 207 U.S. at 178).

That the States must be able to maintain such control without undue congressional interference is reinforced by a clause of the constitution that this Court has been extremely reluctant to enforce, Article IV, § 4. That clause "guarantee[s] to every state in this union a republican form of government." As Justice O'Connor has observed, however, "It is also arguable that the States' autonomy is protected from substantial federal incursions by virtue of the Guarantee Clause of the Constitution, Art. IV, § 4." *South Carolina v. Baker*, 485 U.S. 505, 531 (1988) (O'Connor, dissenting). A state that no longer can structure itself – one whose legislature, as the voice of the people, can no longer decide what authority to delegate and to which kind of subdivision – may no longer have a "republican form of government."

But this Court need not break new Guarantee Clause ground. To "withhold, grant or withdraw powers and privileges" (*City of Trenton v. State of New Jersey*, 262 U.S. at 187) from the subdivisions it creates is not just a "traditional prerogative of the states," *Ours Garage*, 536 U.S. at 428. It is, to borrow language from *F.E.R.C. v. Mississippi*, 456 U.S. at 761, a "quintessential attribute" of

sovereignty. To permit Congress to usurp the states' authority to "withhold, grant or withdraw powers and privileges" (*City of Trenton*, 262 U.S. at 187) would threaten "one of the Constitution's structural protections of liberty" (*Printz*, 521 U.S. at 921). And when a State subdivision, released from state strictures by a distant Congress, runs amok, the people have no effective "means of knowing which of the two governments to hold accountable." *U.S. v. Lopez*, 514 U.S. at 576-577 (Kennedy, J. concurring). Absent a specific grant of authority to Congress that permits the federal government to interfere, States must and do retain the ability to define the authority of the political subdivisions that they themselves create – again, "a question central to state self-government." *Ours Garage*, 536 U.S. at 437.

B. The Commerce Clause does not give Congress the power to usurp the States' power to regulate their political subdivisions.

The Eighth Circuit held that Congress deprived the States of their sovereign power to define the authority of their political subdivisions. Specifically, the court of appeals decided that Congress gave a state's political subdivisions the authority to enter the commercial telecommunications business even though the very laws under which those subdivisions were created and continue to exist deny them that authority. The Eighth Circuit did not expressly identify the source of Congress' power to so interfere with state sovereignty. But the court's citation to *Gregory v. Ashcroft*, 501 U.S. 452 (1991), *see* Pet. App. A-7 et seq., implicitly confirms that the purported source of congressional power must be the Commerce Clause, *i.e.*, the power of Congress to "regulate

commerce . . . among the several states." U.S. Constitution, Art. I § 8.

The Commerce Clause is broadly worded. And its application has expanded as "[e]nterprises that had once been local or at most regional in nature ha[ve] become national in scope." *U.S. v. Lopez*, 514 U.S. at 556 (1995). But even this Court's "modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits." *U.S. v. Lopez*, 514 U.S. at 556-57. The statute at issue here approaches one of those limits: the point at which the power of Congress under the Commerce Clause meets the power of the states to determine their own organization and structure – *i.e.*, to exercise an "undoubted attribute of state sovereignty." *National League of Cities v. Usery*, 426 U.S. 833, 845 (1976).

The admittedly broad language of the Commerce Clause, which could conceivably be read to permit Congress to dictate the States' decisions with regard to autonomy of their subdivisions, does not compel a conclusion that Congress can run roughshod over all attributes of state sovereignty, merely because individually or in the aggregate they could affect interstate commerce. Even in its seminal decision extending Commerce Clause power vis-a-vis the States, the Court recognized that "the text of the Constitution provides the beginning rather than the final answer to every inquiry into questions of federalism, for '[b]ehind the words of the constitutional provisions are postulates which limit and control.'" *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 547 (1985), quoting *Monaco v. Mississippi*, 292 U.S. 313, 322 (1934). One of those "postulates" is the position of the States, discussed above. But another is the

historical intent of the Commerce Clause.

As Justice Stevens observed, "It is important to remember that [the Commerce Clause] was the Framers' response to the central problem that gave rise to the Constitution itself." *E.E.O.C. v. Wyoming*, 460 U.S. 226, 244 (1983) (Stevens concurring). He quoted Justice Rutledge's description of that "central problem": "'to secure freedom of trade, to break down the barriers to its free flow.'" *Id.* quoting W. Rutledge, *A Declaration of Legal Faith* 25-26 (1947).

Though the Commerce Clause was intended only to "break down the barriers" to the "free flow" of trade, the Court has construed it to cover a broad range of activities. The Court has recently "identified three broad categories of activity that Congress may regulate under its commerce power": "to regulate the use of the channels of interstate commerce"; "to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce"; and "to regulate those activities having a substantial relation to interstate commerce, . . . i.e., those activities that substantially affect interstate commerce." *U.S. v. Lopez*, 514 U.S. at 558-559. Were Congress to eliminate Mo. Rev. State. 392.410.7, it would not be "regulat[ing] the use of channels of interstate commerce." Nor would it be regulating or protecting any instrumentality of or person engaged in interstate commerce. It would merely be overriding the State's decision not to enter, via its political subdivision, interstate commerce as a vendor. If that fits within the three-fold description of Commerce Clause power at all, it must be described as an activity that has a substantial relation to interstate commerce.

In determining what "substantially affect[s] interstate commerce," the Court has permitted Congress to aggregate effects of seemingly local acts, perhaps even acts akin to a city's decision whether to enter the commercial telephone business. But as Justice Breyer recently explained, extending the aggregation principle too far threatens to erase the "distinction between national and local authority":

> Virtually all local activity, when instances are aggregated, can have "substantial effects on employment, production, transit, or consumption." Hence Congress could "regulate any crime," and perhaps "marriage, divorce, and childrearing" as well, obliterating the "Constitution's distinction between national and local authority."

U.S. v. Morrison, 529 U.S. 598, 660 (2000) (Breyer dissenting) (citations omitted), quoting 529 U.S. at 615-16..

That threat is particularly real when the activities being aggregated are those at the core of state responsibility. And at that point — when Congress is attempting to control not the state's regulation of private commerce, but the "States as States," *Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc.*, 452 U.S. 264, 265, 287 (1981) (*Hodel*) – a specific constitutional limitation, the Tenth Amendment comes into play. The Tenth Amendment gives critical definition to the "Constitution's distinction between national and local authority." *U.S. v. Morrison*, 529 U.S. at 615. That Amendment, and its assurance of the states' continued sovereignty, explains why "the States as States stand on a quite different footing from an individual or corporation when challenging the exercise of Congress' power to regulate commerce." *Usery*, 426 U.S. at 854, quoted with approval,

Hodel., 452 U.S. at 286. Thus

> when Congress attempts to directly regulate the States as States the Tenth Amendment requires recognition that "there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner."

Hodel, 452 U.S. at 286-287, quoting *Usery*, 426 U.S. at 845.

In *Usery*, the Court found a line between congressional power under the Commerce Clause and state power under the Tenth Amendment at the point where Congress was dictating the terms of state employment. In *Garcia v. San Antonio Metropolitan Transit Authority*, the Court reversed that holding. In doing so, the Court did more than find the line in a different place; it directed the States to look to Congress, not the courts, to protect their sovereignty. 469 U.S. at 552. The Court thus headed toward the position that Justice Douglas had criticized some years before: "The notion that the sovereign position of the States must find its protection in the will of a transient majority of Congress is foreign to and a negation of our constitutional system." *State of New York v. U.S.*, 326 U.S. at 594 (Douglas, J. dissenting).

Since *Garcia*, however, the Court has reasserted some authority to protect the states' sovereignty from Commerce Clause-based usurpation. Justice Kennedy explained the rationale. He cited "Madison's observation that 'the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due,'" The Federalist No. 46, p. 295 (C. Rossiter ed.

1961), and explained that it "can be interpreted to say that the essence of responsibility for a shift in power from the State to the Federal Government rests upon a political judgment." *U.S. v. Lopez*, 514 U.S. at 577 (Kennedy, J. concurring). But he then observed that the mere fact there was a political role did not entirely remove the judiciary from the scene:

> [T]he absence of structural mechanisms to require those officials to undertake this principled task, and the momentary political convenience often attendant upon their failure to do so, argue against a complete renunciation of the judicial role. Although it is the obligation of all officers of the Government to respect the constitutional design, . . . the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far.

Id. at 578.

Justice Kennedy pointed out that the judiciary has found lines between state and federal power without congressional action in the

> exposition of doctrines such as abstention, . . . the rules for determining the primacy of state law, . . . the doctrine of adequate and independent state grounds, . . . the whole jurisprudence of preemption, . . . and many of the rules governing our habeas jurisprudence.

Id. at 578 (citations omitted). But he recognized that the Court has found it difficult "to preserve this principle under the Commerce Clause." He referred to Justice Frankfurter's observations:

> "This clause has throughout the Court's history been the chief source of its adjudications regarding federalism," and "no other body of opinions affords a fairer or more revealing test of

judicial qualities." [F. Frankfurter, *The Commerce Clause under Marshall, Janey and Waite* (1937) at 66-67]. But as the branch whose distinctive duty it is to declare "what the law is," *Marbury v. Madison*, 1 Cranch [137] 177 [(1803)], we are often called upon to resolve questions of constitutional law not susceptible to the mechanical application of bright and clear lines.

U.S. v. Lopez, 514 U.S. at 579 (Kennedy, J. concurring).

Justice Kennedy conceded the difficulty of the task. He recognized the "substantial element of political judgment in Commerce Clause matters." *Id.* He quoted Justice O'Connor, who a few years earlier observed that this Court "cannot avoid the obligation to draw lines, often close and difficult lines" in adjudicating constitutional rights. *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 630 (1989) (O'Connor, J., concurring in part and concurring in judgment), quoted in, *U.S. v. Lopez*, 514 U.S. at 579 (Kennedy, J. concurring). Justice Kennedy then expressly rejected the premise – which some derive from *Garcia* – that this Court's cases teach that it has "no role at all in determining the meaning of the Commerce Clause." *U.S. v. Lopez* 514 U.S. at 579. In fact, he pointed out, the Court has a long history of enforcing the dormant Commerce Clause – despite the absence of any language in the Constitution expressly setting out that "Clause." *See id.* at 579.

The Tenth Amendment, unlike the Dormant Commerce Clause, does have language. But that language does not express the entirety of the Amendment's protection for the States. The Court has observed that the Tenth Amendment's limitation

> is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology.
>
> Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States.

Id. at 156-157.

The separation between congressional authority under the Commerce Clause and state authority protected by the Tenth Amendment is a "close and difficult line." But this Court has recognized that the line cannot be stretched too far; it must leave the States with "a significant measure of sovereign authority." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. at 549; quoting *E.E.O.C. v. Wyoming*, 460 U.S. at 269 (Powell, J. dissenting). Thus, when faced with Commerce Clause legislation that nears the "limits that . . . reserve power to the States" (*New York v. U.S.*, 505 U.S. at 157), this Court has often reiterated the importance of preserving the States' sovereignty. For example, the Court has

> warned that the scope of the interstate commerce power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."

U.S. v. Lopez, 514 U.S. at 557, quoting *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 22, 37 (1937). In *Jones & Laughlin Steel*, the Court affirmed that "Congress' regulatory authority" under the Commerce Clause "is not without effective bounds." *U.S. v. Lopez*, 514 U.S. at 557. Defining

the authority of state subdivisions, one of the quintessential attributes of sovereignty, must be outside the scope of those bounds.

There are times, of course, when a State voluntarily steps across the boundary, leaving its "inviolable sovereignty" behind and becoming subject to congressional Commerce Clause power. This Court has recognized "a Constitutional line between the State as government and the State as trader." *State of New York v. U.S.*, 326 U.S. at 579 citing *State of Ohio v. Helvering*, 292 U.S. 366, 369 (1934). When a State enters the marketplace, it accepts the burdens that Congress imposes on private traders. *Helvering*, 292 U.S. at 369. To cite one example, a State accepts the burdens of congressional regulation when it chooses to enter the railroad business. *See United States v. California*, 297 U.S. 175 (1936). The same would be true if the State of Missouri entered the telecommunications business, either directly or through its political subdivisions.

But Missouri has chosen not to take that step. The Eighth Circuit, in its opinion below, 299 F3d. 949 (8th Cir. 2002) nonetheless subjected Missouri's internal decision making to Congressional veto. It ignored this Court's mandate under the Tenth Amendment "to determine . . . whether an incident of state sovereignty is protected by a limitation on an Article I power." *New York v. U.S.*, 505 U.S. at 157. The definition of the authority of state subdivisions is an "incident of state sovereignty" that merits protection. Had Congress used its Commerce Clause power to usurp Missouri of that power, it would have exceeded its authority under the Commerce Clause. But, as discussed below, § 253(a) can and must be read to have a narrower, fully constitutional impact.

II. By choosing a generality – "any entity" – instead of specifically limiting the States' historic power to define the authority of their political subdivisions, Congress did not extend its Commerce Clause power to have that limiting effect.

A. Congress only preempts the States' historic sovereign powers when it uses language that is clear and manifest.

Rather than address congressional power, this case has devolved into an argument about whether by using the term, "any entity," Congress clearly and unmistakably demonstrates an intent to preempt state law. The demand for such clarity derives from the federalism concerns discussed above. Rather than address the Tenth Amendment directly each time a congressional act could be read to apply to the States in their sovereign role, this Court has developed a strict standard that applies when Congress works along the edge of its authority vis-a-vis the States. When the Court considers federal laws that affect the States' historic powers, it holds those powers to have been removed only when that "was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (*Rice*). That standard protects the states' sovereignty in two ways: directly, by interpreting federal legislation, where possible, to draw back from the edge of congressional authority; and indirectly, by empowering the states – on notice because of the clear language of pending legislation – to mobilize their efforts to defeat the proposal in the legislative, rather than the judicial arena.

In the last 20 years, this Court has consistently insisted on congressional compliance with the "clear

and manifest" standard. And it has reiterated the reason for that standard, *i.e.*, its recognition that the "states occupy a special and specific position in our constitutional system," (*Garcia v. San Antonio Metropolitan Transit Auth.* 469 U.S. at 547) and that the "'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the framers to ensure the protection of 'our fundamental liberties.'" *Id.* at 572, quoted in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985).

The demand for unmistakably clear language finds a definitive statement, in the context of issues that go to the core of state sovereignty, in *Gregory v. Ashcroft*. There this Court reiterated its demand that Congress "make its intention 'clear and manifest' if it intends to preempt the historic powers of the States." 501 U.S. at 461. *See also Essex Transportation, Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (preemption will not lie unless it is "the clear and manifest purpose of Congress"), citing *Rice*, 331 U.S. at 230. Since *Gregory*, the Court has continued to demand that kind of clarity from Congress. *E.g., California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, 519 U.S. 316, 325 (1997); *New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995).

In many of the cases where a demand for a "clear and manifest" statement has been brought to this Court, the power of Congress to bind the states is unquestioned – as, for example, when Congress is using its authority under section 5 of the Fourteenth Amendment. *See, e.g., Will v. Michigan Dept. of State Police*, 491 U.S. 58, 60 (1989). The standard should be even more strictly applied where Congress is working at the edges of – if not beyond

– its Commerce Clause authority.

B. A general reference to "any entity" does not clearly nor manifestly preempt state authority.

Preventing the States from regulating the commercial activities of themselves and their subdivisions, assuming that Congress was constitutionally authorized to usurp state sovereignty by, the question would be whether Congress' intention to do so was "clear and manifest." It was not.

Unlike the Fair Labor Standards Act (*see Garcia*, 469 U.S. at 556), for example, the Telecommunications Act does not contain, in § 253(a) or else-where, a pertinent definition or provision that refer-ences the ability of the States or their subdivisions to engage in the commercial telecommunications business. The *sole* basis for the Eighth Circuit's holding, and the arguments of respondents to that court and to the FCC, is that "any entity" is an all-inclusive term. Where the Eighth Circuit here and the D.C. Circuit in *City of Abilene* differed was in their conclusions upon applying the "clear and manifest" standard to the isolated words, "any entity."

The use of broad terms in federal statutes is certainly not unusual – indeed, "any entity" is used elsewhere in the United States Code, though, fortunately, usually with more definition than § 253(a) provides. *E.g.*, 7 U.S.C. § 87(b)(2); 11 U.S.C. § 557(g)(1); 11 U.S.C. § 1126(c); 33 U.S.C. § 1502(2); 47 U.S.C. § 303c(b)(2).

A similarly broad term, "person" is also used at various places in the Code. *E.g.*, 15 U.S.C. § 13a; 17 U.S.C. § 506(a); 42 U.S.C. § 1983. And when

this Court applied the "clear and manifest" standard to "person," it found that term wanting. In *Will v. Michigan Dept. of State Police*, the Court held that "every person," as used in 42 U.S.C. § 1983, did not include a state, even though a State fits within some definitions of "person." 491 U.S. at 65. The Court demanded that Congress "make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States." *Id.*, quoting *Rice*, 331 U.S. at 230. "Every person" was not, this Court held, clear enough – even when Congress was exercising its undisputed authority under § 5 of the Fourteenth Amendment.

To distinguish "any entity" from "every person," the Eighth Circuit took its definition of "entity" from Black's Law Dictionary. According to that court, "[a]n entity is '[a]n organization (such as a business or a governmental unit) that has a legal identity apart from its members," and a public entity is a "governmental entity, such as a state government or one of its political subdivisions." BLACK'S LAW DICTIONARY, 553 (7th ed. 1999), quoted, Pet. App. A-9. But a myopic focus on that definition suggests clarity that simply does not exist. There are other definitions of "entity" that do not necessarily correspond to the one used by the Eighth Circuit. For example, an "entity" may be "something that exists independently, not relative to other things." THE AMERICAN HERITAGE DICTIONARY (NEW COLLEGE EDITION, 1981), p. 437.

Local governments do not, of course, "exist independently"; they exist only as subdivisions of the States. Using the Eighth Circuit's parlance and this Court's precedent, they do not have a "legal identity" apart from the State of Missouri. They could be considered "entities" within the Telecommunications Act only if something becomes

an "entity" merely by virtue of being "a particular and discrete unit." But such a definition has no rational limit.

In fact, neither the Eighth Circuit, in its decision, nor the Missouri Municipals, at any point in this proceeding, has provided a definition that places any limit, much less a rational one, on its scope. The Missouri Municipals entirely avoid drawing any line around "entities." They certainly would call cities and the utilities they create and control "entities." But the same would be true, logically, for school, water, conservation, and fire protection districts. And there is no logical distinction – given the dictionary definitions, at least – between those "entities" and the Missouri Coordinating Board for Higher Education, the Board of Curators of the University of Missouri, the Missouri Public Service Commission, and the Missouri Department of Conservation. Even the Office of the Attorney General and the Missouri Supreme Court are "entities." Under a logical extension of the Eighth Circuit's reading of the law, Congress has preempted any state law that prevents any "entity" created and regulated by the State of Missouri – down to the Interior Designer Council – from entering the commercial telecommunications business.

When the State pointed out the necessary result of defining "any entity" to include every office, agency, and subdivision that a State creates, the Eighth Circuit responded by denigrating the argument as "highly fanciful" (Pet. App. A-13). If that is true, it is only because those who manage most state agencies and subdivisions will be wise enough to choose against departing from their state-defined missions by becoming vendors in the commercial telecommunications market. Though

such individual wisdom may make the parade of horribles unlikely, calling the argument "fanciful" does not defeat it. The fact remains that the Eighth Circuit's interpretation of "any entity" is all-encompassing.

The Eighth Circuit rests its rejection of the D.C. Circuit's rationale in *City of Abilene* not just on its own selection of dictionary definitions, but on its observation that the D.C. Circuit did not consider *Salinas v. United States*, 522 U.S. 52 (1997). Pet. App. A-11. The Eighth Circuit finds *Salinas* crucial to understanding the effect of the word "any." In *Salinas*, this Court ruled that a federal bribery statute applicable to "any business transaction" includes bribes of state officials. *Id.* at 60. Mario Salinas tried to overturn his conviction for bribery. He was a state official (chief deputy at a jail). Salinas claimed that "any business transaction" could only apply to federal funds. He argued that otherwise, it would upset the federal-state balance of powers. The Court rejected that argument.

"Any business transaction" in the context of criminal bribery is not comparable to "any entity" in the context of the provision of telecommunication services. No state will claim that a federal statute criminalizing bribery related to "any business transaction" will violate its Tenth Amendment protections or upset the delicate balance of power between the federal government and the states. That is because no state has a sovereign interest in protecting criminals who would corrupt government by bribing public officials – federal or state. The statute at issue in *Salinas* simply does not interfere with the State's governance of its own political subdivisions. Section 253(a) does.

That "any entity," so broadly defined, does not

clearly and manifestly include the states and their subdivisions is additionally evident from the fact that beyond the Eighth Circuit, another court of appeals, two state supreme courts, a third state appellate court, a federal district court, and the federal administrative agency commissioned with implementation of the Telecommunications Act of 1996 disagree on the whether the term "any entity" extends to municipalities. *See City of Abilene, Texas v. Federal Communications Comm'n.*, 164 F.3d 49; *Iowa Tel. Ass'n. v. City of Hawarden*, 589 N.W.2d 245 (Iowa 1999); *In Re: Application of Lincoln Elec. Sys.*, 655 N.W.2d 363 (Neb. 2002); *Municipal Elec. Auth. of Ga. v. Georgia Pub. Serv. Comm'n.*, 525 S.E.2d 391 (Ga. App. 1999); *City of Bristol v. Earley*, 145 F. Supp.2d 741 (W.D. Va. 2001); *In re: City of Abilene Petition for Preemption*, 13 F.C.C.Rcd. 3460 (1997); *In re: Missouri Municipal League Petition for Preemption*, Pet. App. A-15 - A-33.[3] This split among the courts – regardless of which ones correctly discerned congressional intent – demonstrates that the congressional language is neither clear nor manifest. Thus, to paraphrase this Court's language in *Ours Garage*, 536 U.S. at 426, "Absent a basis more reliable than statutory language insufficient to demonstrate a 'clear and manifest purpose' to the contrary, [this Court] should resist attribution to Congress of a design to

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[3] The certainty found by the Eighth Circuit is also hard to reconcile with the undefined use of the term, "ability" in § 253(a). Congress has barred states from prohibiting or having the effect of prohibiting "the *ability* of any entity to provide any interstate or intrastate telecommunications service." (Emphasis added.) Section 392.410.7 does not address "ability"; it addresses only the *authority* of Missouri political subdivisions to extend their reach into telecommunications service.

disturb a State's decision" on the delegation of authority by the State to its political subdivisions.

C. Nothing in the legislative history of § 253(a) manifests congressional intent to include the States and their subdivisions among the entities that States and local governments cannot control.

This Court's demand for "clear and manifest" language in the statute eliminates any legitimate basis for searching the legislative history of the Telecommunications Act. But such a search would be unavailing in any event. The most that respondents can point to is a patchwork of out-of-context statements – statements that would be insufficient to warn the States that Congress might be usurping their power.

That is what the Missouri Municipals did before the Eighth Circuit. First they cited the Congressional history of the Telecommunications Act of 1996 and a predecessor bill, S.1822, 103d Cong., 2d Sess. (1994), to note that Congress discussed the prohibition contained in the Public Utility Holding Company Act of 1935 (PUHCA) to PUHCA-regulated companies' providing telecommunications services. The Missouri Municipals argued that if Congress intended PUHCA-regulated companies to fall within the meaning of "any entity," used in the context of § 253(a), that is evidence that "any entity" must include political subdivisions of states. That argument ignores the basic fact that neither states nor their political subdivisions are regulated under

the PUHCA.[4]

The Missouri Municipals also argued below that Congress knew how to use the terms "states" and "political subdivisions" and would have expressly excluded them from § 253(a) if that were Congress' intent. That logic can be equally used to assert that Congress, in drafting the Telecommunications Act, demonstrated cognizance of the terms "states" and "political subdivisions" (or, to use the § 253(a) language, "local" governments), and could have expressly included those terms within "any entities" in § 253(a). Indeed, knowing of the precedents insisting on "clear and manifest" language to extend such generalities to include the States, Congress would have done so had it really intended to take the drastic step of invading the State's authority to regulate their own municipalities. But nothing in the history of § 253(a) states that Congress intended to extend the law so far, *i.e.*, to restrict the way States organize themselves through and delegate authority to political subdivisions.

But again, the legislative history if irrelevant. And, assuming that § 253(a) can even be logically read to bar the States from regulating their own subdivisions, and that Congress has the power to take that step, nothing in the statutory language makes clear that is what Congress intended. In the absence of such clarity, this Court's precedents demand that the statute be interpreted not to approach, much less cross, the constitutional line

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[4] PUHCA regulates "holding companies," i.e., companies that own the stock of entities providing utility service. Missouri's constitution restricts the ability of cities and political subdivisions from holding stock in corporations or associations. Art. VI, § 23, Missouri Constitution.

protecting state sovereignty. As discussed below, there is a way to read the statute to avoid those complications. And that is the only logical reading of § 253(a).

III. Logically read, § 253(a) excludes the States and local governments from the "entities" they cannot control.

The issue posed here really should be much simpler than the FCC or the Eighth or D.C. Circuits suggest. In fact, the language of the statue itself accommodates only one logical reading.

Section 253(a) does not consist only of the words, "any entity," as someone skimming the Eighth Circuit's opinion might expect. Though short, it does contain a complete sentence:

> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

The sentence describes involvement in telecommunications regulation from two different directions. The first is regulatory, the sources of regulation: (a) "State[s]" and (b) "local" governments. The second direction is the source of competition: "any entity" that wishes "to provide any interstate or intrastate telecommunications service." The Eighth Circuit's reading of the statute makes the sources of regulation part of the source of competition. Unless and until the source of regulation chooses to also become a source of competition, that reading makes no sense.

The fallacy in the Eighth Circuit's reading is evident by replacing the term chosen for the source of competition with the terms chosen for the

sources of regulation, *i.e.*, by replacing "any entity" with a term that the Eighth Circuit says is a subset of that group. Such a statute would read: "No State may prohibit or have the effect of prohibiting its own ability to provide any interstate or intrastate telecommunications service." Or: "No local government may prohibit or have the effect of prohibiting its own ability to provide any interstate or intrastate telecommunications service." Neither sentence makes any logical or policy sense. Though they may be unable to interfere with the decisions of private companies to enter the telecommunications business, obviously States must be able to make the same choices about whether to enter that business themselves.

That the respondents here are municipalities ("local" governments, as referenced in § 253(a)) whose ability to enter the commercial telecommunications business is being restricted by a State does not change the logic. As discussed above, pp. 13-18 *supra*, State subdivisions are not independent organizations, entitled to make decisions without delegated authority. They are constituent parts of the state. To read § 253(a) to prevent the State from determining what powers it has delegated to any constituent part is not a logical, and thus not a permissible, reading of § 253(a).

No provision of the Constitution of the United States recognizes the existence of a city or county, let alone a municipal utility. No clause of the federal constitution prohibits a state from creating its own political subdivisions and delegating powers or authority to those subdivisions. No clause of the federal constitution mandates that the states delegate certain powers to political subdivisions - creatures that exist at the complete discretion of the state. And there is no constitutional reading of

§ 253(a) that replaces the State of Missouri's limited delegation of authority to its political subdivisions with what amounts to carte blanche to become a commercial telecommunications service.

CONCLUSION

For the reasons stated above, the Court should reverse the Eighth Circuit's decision and remand the case with instructions to reinstate the FCC's order denying preemption of Mo. Rev. Stat. § 392.410.7, and thus preserving the States' power to allocate authority to and among their officers, agencies, and political subdivisions.

Respectfully submitted,

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